88-924

Supreme Court, U.S.
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CLERK

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN N. GRONDA, Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

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QUESTIONS PRESENTED

1. WHETHER THE APPEALS COUNCIL OF THE SOCIAL SECURITY ADMINISTRATION IS PRECLUDED FROM REVIEWING THE FAVORABLE ASPECTS OF AN ADMINISTRATIVE LAW JUDGE'S DECISION BECAUSE THEY DID NOT NOTIFY THE CLAIMANT OF SAME WITHIN SIXTY DAYS OF SAID DECISION AS REQUIRED IN 20 CFR 404.969 WHEN THE CLAIMANT HAS REQUESTED THAT ONLY THE UNFAVORABLE ASPECTS OF SAID DECISION BE REVIEWED.

2. WHETHER ADEQUATE WEIGHT WAS GIVEN TO THE OPINIONS OF THE ADMINISTRATIVE LAW JUDGE AND THE CLAIMANT'S TREATING PHYSICIANS.

3. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DECISION OF THE ADMINISTRATIVE LAW JUDGE OR THE SECRETARY.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

JOHN N. GRONDA, Petitioner

v

OTIS BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, John N. Gronda, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered September 2, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals (App A, infra, A-1) is not yet reported. The Judgment of the District Court was not reported; the Judge accepted the Magistrate's Report and Recommendation; the Recommendation and the

Court's Judgment are found in Appendix B, at B-1 to B-22.

JURISDICTION

The Judgment of the Court of Appeals (App. A, A-1 to A-7) was entered on September 2, 1988. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 20 CFR 404.955 states:

"The decision of the administrative law judge is binding on all parties to the hearing unless -

(a) You or another party request a review of the decision by the Appeals Council within the stated time period, and the Appeals Council reviews your case;

(b) You or another party requests a review of the decision by the Appals Council within the stated time period, the Appeals Council denies your request for review and you seek judicial review of your case by filing an action in a Federal district court;

(c) The decision is revised by an administrative law judge or the Appeals Council under the procedures explained in Sec. 404.987;

(d) The expedited appeals process is used; or

(e) The decision is a recommended decision directed to the Appeals Council."

2. 20 CFR 404.967 states:

"If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes."

3. In pertinent part, 20 CFR 404.968(a)(1), states:

"(a) Time and place to request Appeals Council review. You may request Appeals Council review by filing a written request. Any documents or other evidence you wish to have considered by the Appeals Council should be submitted with your request for review. You may file your request -

(1) Within 60 days after the date you receive notice of the hearing decision or dismissal,..."

4. 20 CFR 404.969 states:

"Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the

hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address."

STATEMENT

Mr. Gronda, Petitioner, worked as a Structural Iron Worker from 1951 through 1980 when injuries forced him to quit working. He received Workers Compensation benefits and did not apply for Social Security Disability Benefits until October 23, 1984. His application was denied initially and on reconsideration. Mr. Gronda then requested a Hearing before an Administrative Law Judge (ALJ).

Following the hearing on January 23, 1986, the ALJ found that Gronda was disabled as of April 4, 1985. Gronda filed a request for review. In his request for review, Gronda stated that he disagreed with the ALJ's decision because:

"The Judge determined I was not disabled until April, 1985. I was

> disabled prior to that date. Substantial evidence does not support the Judges [sic] determination. He did not follow the law. I am not appealing the decision that I am disabled after April, 1985." (Emphasis added)

Gronda's request for review was filed on March 21, 1986, within the 60-day period allowed by 20. CFR Sec. 404.968(a)(1).

The Administration began paying Social Security disability benefits as of April, 1985. Mr. Gronda received and cashed the checks and used the money to pay for his expenses of living.

20 CFR 404.969 explains:

> "Any time within 60 days after the date of a Hearing Decision or Dismissal, the Appeals Council itelf may decide to review the action that was taken. If the Appeals Council does review the Hearing Decision or the Dismissal, notice of the action will be mailed to all parties at their last known address."

On August 18, 1986, some eight months after the ALJ's decision, the Appeals Council wrote Mr. Gronda and explained they were granting his

request for review.

For the very first time, they also told him they were going to reverse the ALJ and hold that he was not disabled at any time at issue and would not be entitled to any disability benefits. It is undisputed that this "Notice" was almost six months beyond the sixty day requirement of 20 CFR 404.969, supra.

In their letter of August 18, 1986, the Appeals Council stated:

> "Therefore, although you may not be able to return to your past job, absent persuasive evidence to the contrary, the Council intends to issue a decision in which it will be found that you were not under a 'disability' as defined in the Social Security Act for 12 continuous months and that you are not disabled . .....
>
> Additional evidence or a further written statement as to the facts and/or law should be submitted by mail to the Appeals Council within 20 days from the date of this letter or the Council should be informed within the time when the material may be expected. Pursuant to section 202(j)(2) of the Social Security Act, additional evidence

> will be considered only if it is new and material and relates to the issue of 'disability' beginning on or before January 23, 1986, the date of the Administrative Law Judge's decision." (Emphasis added)

Mr. Gronda did not submit any additional evidence because all of his medical records and any other information that pertained to his disability had already been submitted. On October 17, 1986, the Appeals Council issued a decision reversing the ALJ .

Gronda filed a civil action in the District Court. He argued there was not substantial evidence to support the Appeals Council's decision; adequate weight was not given to the physician's opinions nor the ALJ's; and that the Appeals Council was precluded from reviewing anything beyond whether Gronda was disabled prior to April, 1985. His arguments were rejected.

Mr. Gronda appealed to the U.S. Court of Appeals for the Sixth Circuit and argued that the Appeals Council could not review anything

more than the date of onset question because they did not give him Notice within 60 days of the ALJ's decision as required by 20 CFR 404.969, supra.

Three U.S. Courts of Appeals have addressed situations similar to the one in this case. There is a split among the Circuits as to the proper way to construe the statute. The Sixth Circuit, has agreed with the Seventh Circuit's decision as stated in DeLong v Heckler, 771 F2d 266 (1986).

Two Circuits, the Third and Eleventh, disagreed with the Sixth and Seventh Circuits. The Third Circuit holds that the Appeals Council can not review an entire case when the claimant only appeals part of the decision unless the Council gave the claimant Notice of its intention to do so within the sixty-day period required by Section 404.969. See Powell v Heckler, 771 F2d 266 (3rd Cir. 1985); Littlefield v Heckler, 829 F2d 242 (3rd Cir.

1987); Chrupcala v Heckler, 829 F2d 1269 (3rd Cir. 1987).

The Eleventh Circuit in Kennedy v Bowen, 814 F2d 1523 (1987), also disagreed with the Seventh Circuit. Judge Tuttle, writing for the court, stated that the Appeals Council has to give notice of its intention to review an entire decision to a claimant who seeks to appeal an aspect of a narrow decision. Although the opinion stated that the Court agreed with the Third Circuit, the Kennedy case, and a subsequent Eleventh Circuit case, did not address the question whether the notice given by the Appeals Council must be given within sixty days. See Bevins v Bowen, 833 F2d 293 (11th Cir. 1987).

Thus, the herein decision and the decision in the Seventh Circuit conflict with decisions in both the Third and Eleventh Circuits.

REASONS FOR GRANTING THE PETITION

Consideration by this Court is necessary because the holding in this case squarely conflicts with the holding in Powell v Heckler, supra, of the Third Circuit.

Additionally, the Seventh Circuit and Eleventh Circuit have both decided similar cases with conflicting results. The Seventh Circuit, in DeLong v Heckler, supra, is in alignment with the Sixth Circuit's decision herein.

The Eleventh Circuit, in Kennedy v Bowen, supra, adopted the rationale of the Third Circuit in Powell, supra. Thus, two Circuits interpret the same statute (20 CFR 404.969) to hold that the Appeals Council must give notice of review within 60 days or be precluded from reviewing the ALJ's decision, while two other Circuits squarely disagree.

In view of the direct conflict of decisions, this Court should resolve the conflict because

it involves an important issue which affects many claimants. It is simply not fair that a claimant in Michigan or Illinois does not have the same appellate rights as one in Delaware, Pennsylvania or Florida.

In their decision, the Sixth Circuit quoted from DeLong, 771 F2d at 268, and stated "Although the Secretary's argument that the regulations are clear is meritless, the fact remains that the task of the Appeals Council is to ensure consistency of results in the benefits program." Unless this Court resolves the conflict, there will not be consistent results from one portion of the County to another.

As applied to Mr. Gronda's case herein, had Mr. Gronda known that his Appeal would have possibly jeopardized his whole claim, he would not have Appealed. Mr. Gronda's insured status expired at the end of December, 1985. Had he known the Appeals Council could reopen his

entire Appeal, he definitely would not have Appealed.

Mr. Gronda is situated almost exactly the same as the claimant in Powell, supra. They both were allowed disability benefits with an onset date subsequent to the date requested. They both Appealed only that part of the Decision stating they were not disabled prior to the date determined by the ALJ.

In both cases, the Appeals Council did not decide to review the ALJ's Decision within the 60 day time period of Section 969. (They waited nine months with Mr. Powell and eight months with Mr. Gronda.) In both cases the claimant collected Workers Compensation.

Although the Court below acknowledged "it perhaps would be desirable to include in the regulations a warning that an appeal will put the entire decision at issue" it did not deem it necessary to satisfy due process.

Claimant submits it is fundamentally unfair to him and others in the Sixth and Seventh Circuits in that their rights to appeal a partially favorable decision are significantly "chilled" even with the above warning because Social Security claimants in the Third and Eleventh Circuits can appeal a partially favorable decision with much less fear that they will lose what they have already won.

As noted, Mr. Gronda received disability benefits as per the ALJ's initial decision. These payments continued until recently. Now, the Administration has requested that Mr. Gronda repay them in full. The amount demanded is $16,583.50. Mr. Gronda has filed a Request for Review and/or Waiver pending the Courts' Decision. It is not fair that similarly situated claimants in the Third or Eleventh Circuits could appeal a partially favorable decision and not face the same consequence.

Had the Appeals Council adhered to their

statute and notified Mr. Gronda within 60 days and informed him they were going to reverse the ALJ, he would not have received monthly checks. He may have had it more difficult because of the loss of a monthly check; however, he would not have to come up with over $16,500.00 or face losing future retirement benefits if it is not repaid. This is especially unfair to a man who had paid into the fund for some thirty years. Had the Sixth Circuit followed the Third or Eleventh Circuits' decisions, he would not have this tremendous financial burden placed upon him.

For purposes of completeness, Petitioner also maintains that the District Court's standard of review when the Appeals Council reverses an ALJ should be whether there was substantial evidence to support the ALJ. This view is similar to the Sixth Circuit's holdings prior to Mullin v Bowen, 800 F2d 535 (6th Cir. 1986).

The Petitioner further states the Secretary did not give adequate weight to the treating physicians' opinions as required by Walston v Gardner, 381 F2d 580 (6th Cir. 1967), and that there is not substantial evidence to support the Secretary's decision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Daniel H. Pyscher
Timothy J. Taylor
Daniel R. O'Neil
Attorneys for Petitioner

November, 1988

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN N. GRONDA, Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent

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AFFIDAVIT OF MAILING

STATE OF MICHIGAN)
COUNTY OF ISABELLA) SS.

Daniel H. Pyscher, being first duly sworn, states as follows:

1. That he is a Member of the Bar of the U.S. Supreme Court.

2. That 40 copies of Petitioner's Writ of Certiorari, and accompanying Appendix were mailed by the undersigned on November 30, 1988, at the United States Post Office in Mt. Pleasant, Michigan to the Clerk of the U.S. Supreme Court, together with the $200.00 filing fee.

3. That 3 copies of said Writ of Certiorari with accompanying Appendix were, in the same manner, mailed to Robert E. Hanson, Attorney for Respondent, at his address of 300 South Wacker Drive, 18th Floor Chicago, Ill 60606.

4. That postage on said mailing was prepaid and said mailing was within 90 days of the Court of Appeals Decision in the above matter and was timely, as required by Court Rule.

5. Affiant, if sworn as a witness, can testify competently to the facts contained herein.

Daniel H. Pyscher, Affiant

Subscribed and sworn to before me, a Notary Public, on the 30th day of November, 1988.

Connie R. Dinius
Notary Public
Isabella Co., Michigan

My Commission Expires:
08-08-89

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN NORMAN GRONDA,
Plaintiff-Appellant,
v.
SECRETARY OF HEALTH & HUMAN SERVICES,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 2, 1988

Before: MERRITT, KRUPANSKY and BOGGS, Circuit Judges.

MERRITT, Circuit Judge. In this social security appeal, we must determine the scope of the review which may be undertaken by the Appeals Council of the Social Security Administration when a claimant requests review of only a narrow aspect of an administrative law judge's decision. Because we decide that the Appeals Council did have jurisdiction to review the entire case, we must also determine whether its decision was supported by substantial evidence. We hold that it was.

Appellant John Norman Gronda applied for disability benefits on October 23, 1984. His application was denied initially

and upon reconsideration. Gronda then requested a hearing before an ALJ. Following the hearing, on January 23, 1986, the ALJ found that Gronda was disabled as of April 4, 1985. Gronda filed a request for review. In his request for review, Gronda stated that he disagreed with the ALJ's decision because:

> The Judge determined I was not disabled until April, 1985. I was disabled prior to that date. Substantial evidence does not support the Judges [sic] determination. He did not follow the law. I am not appealing the decision that I am disabled after April, 1985.

Gronda's request for review was filed on March 21, 1986, within the 60-day period allowed by 20 C.F.R. § 404.968(a)(1).

On August 18, 1986, the Appeals Council wrote Gronda a letter that stated that his request for review was granted and the Council had concluded that the ALJ's finding that Gronda was disabled was not supported by substantial evidence. Gronda was told he could submit additional evidence or a further written statement within twenty days, but he submitted no additional evidence. On October 17, 1986, the Council issued a decision reversing the ALJ.

Gronda filed a civil action in the District Court. His case was referred to a magistrate, who issued a report and recommendation that the Appeals Council be affirmed. Gronda filed objections to the magistrate's report. The District Judge then reviewed the case and granted the Secretary's motion for summary judgment. Gronda appealed.

Gronda argues that the Appeals Council could not review anything more than the date of onset question without giving him notice within sixty days of the ALJ's decision, relying on 20 C.F.R. § 404.969:

> Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may

> decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address.

Because he did not receive notice that the Appeals Council intended to review the entire decision, rather than merely the date of onset issue, within sixty days, Gronda states that the Appeals Council should have been foreclosed from examining anything but the one issue he appealed.

The Secretary argues that the regulations clearly mean "the entire decision" when they refer to a "decision," and that 20 C.F.R. § 404.976(b), which states that the Appeals Council will base its decision on "all the evidence," supports that view.

The general rule, of course, is that agency interpretations of self-prescribed regulations are afforded a considerable presumption of validity. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). The Secretary argues for absolute deference to his interpretation of the regulations, but our review must also be colored by respect for fundamental notions of fairness. If the Secretary were due the degree of deference he seeks, review by the judiciary would achieve no purpose. The Secretary's interpretation *is* entitled to deference, but the degree of deference is lessened when "the focus is exclusively on procedural considerations pertaining to notice and fundamental fairness, in other words, *legal* issues not generally recognized to be within the Secretary's ken and, for obvious reasons, more commonly consigned to the judiciary's 'field of expertise.' " *Powell v. Heckler*, 789 F.2d 176, 179 (3d Cir. 1986).

Three Courts of Appeals have addressed situations similar to the one in this case. In *DeLong v. Heckler*, 771 F.2d 266 (7th Cir. 1985), Judge Posner stated that "it would be a quite pointless exercise in shuffling paper for the Council, having received the claimant's notice of appeal within 60 days, to

then have to issue its own notice of intent to review the case." 771 F.2d at 268. The court noted that the Appeals Council's practice did not operate unfairly, because partially successful claimants are unable to foreclose review of their cases simply by refusing to appeal.

Two Circuits have disagreed with the Seventh Circuit. In *Powell v. Heckler*, 789 F.2d 176, the Third Circuit held that the Appeals Council could not review an entire case when the claimant only appealed part of the decision unless the Council gave the claimant notice of its intention to do so within the sixty-day period required by § 404.969. The Court stated:

> [I]t is no empty gesture to put claimants on fair and prior notice that an appeal of a discrete and narrow issue may jeopardize an entire benefits award. . . . [F]undamental fairness requires that partly dissatisfied claimants like petitioners be apprised of the risks inherent in their projected appeals.

789 F.2d at 180. *See also Littlefield v. Heckler*, 824 F.2d 242 (3d Cir. 1987); *Chrupcala v. Heckler*, 829 F.2d 1269 (3d Cir. 1987).

The Eleventh Circuit, in *Kennedy v. Bowen*, 814 F.2d 1523 (1987), also disagreed with the Seventh Circuit. Judge Tuttle, writing for the court, stated that the Appeals Council has to give notice of its intention to review an entire decision to a claimant who seeks to appeal an aspect of a narrow decision. Although the opinion stated that the court agreed with the Third Circuit, the *Kennedy* case, and a subsequent Eleventh Circuit case, did not address the question whether the notice given by the Appeals Council must be given within sixty days. *See Bivins v. Bowen*, 833 F.2d 293 (11th Cir. 1987).

Our examination of the statute and regulations leads us to the conclusion that the Seventh Circuit is correct in its

view that there is no fundamental unfairness in the Appeals Council's practice. Although the Secretary's argument that the regulations are clear is meritless, the fact remains that the task of the Appeals Council is to ensure consistency of results in the benefits program. *DeLong*, 771 F.2d at 268. Although it perhaps would be desirable to include in the regulations a warning that an appeal will put the entire decision at issue, we cannot say that due process requires such a caveat in this case. Although the Appeals Council waited several months to notify Gronda of its intention to review his entire case rather than merely the date of onset issue he sought to appeal, Gronda was given the opportunity to submit new evidence and/or arguments. He did not avail himself of this opportunity. Thus the only "unfairness" Gronda can complain of is that he asked the Appeals Council to review only one part of the decision, and the Council reviewed the entire decision. Because the Council unquestionably has the power to review a decision on its own initiative, there is no unfairness implicit in such an occurrence.

Turning to the substance of the appeal, we hold that substantial evidence supports the Secretary's decision. Gronda argues that the Council failed to give adequate weight to the findings of the ALJ or the treating physician, and he claims that the ALJ was wrong in his determination of the date of onset.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The record indicates that Mr. Gronda's knee and back problems did not prevent him from exerting himself to the extent necessary to perform light work, and that his subjective allegations of pain were disproportionate to his underlying condition. *See Duncan v. Secretary of Health and Human Services*, 801 F.2d 847, 853 (6th Cir. 1986). The magistrate who reviewed Mr. Gronda's case analyzed all of the evidence and recommended that the Appeals Council be affirmed. For the reasons stated

above, and for the reasons expressed in the magistrate's Report and Recommendation, we affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-1770

JOHN NORMAN GRONDA,

Plaintiff-Appellant,

v

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant/Appellee.

Before:
MERRITT, KRUPANSKY & BOGGS, Circuit Judges

J U D G M E N T

On Appeal from the United States District Court for the Eastern District of Kentucky. [sic]

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgement of said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
S/Leonard Green, Clerk

Issued as Mandate: September 29, 1988
COSTS: NONE

Attest:
S/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN NORMAN GRONDA,
SS# 369-34-5888

Plaintiff,

v
SECRETARY OF HEALTH & HUMAN SERVICES,

Civil No. 86-CV-10397-BC
HON. JAMES P. CHURCHILL
MAG. CHARLES E. BINDER

Defendant.
_____ _____ /

MAGISTRATE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. section 636(b)(1)(B), Appendix C-1(d) of the Local Rules of the United States District Court for the Eastern District of Michigan, and by Order of Reference, the above entitled matter was referred to the undersigned Magistrate for the purpose of conducting a review of the Secretary's decision denying Plaintiff's claim for a period of disability and disability insurance benefits. This matter is currently

before the Court on cross motions for summary judgment.

Introduction

Plaintiff was born on July 24, 1931 and has completed a high school education (Tr. 32). His relevant work history included approximately 29 years work as an iron worker, last working as a gang foreman (Tr. 33-35).

Agency Action

Plaintiff filed the instant claim on October 23, 1984 (Tr. 70). He alleged that he became unable to work on January 30, 1980 (Id.). The alleged disability was due to arthritis and internal derangement of the right knee (Id.). The claim was intially denied and denied upon reconsideration (Tr. 74-78, 80-84). In denying the Plaintiff's claim, Defendant Secretary also considered degenerative disc disease as a possible basis of disability (Id.).

On October 22, 1985, the plaintiff appeared

with counsel before Administrative Law Judge (ALJ) Robert G. Hull, who considered the case de novo. In a decision dated January 23, 1986, the ALJ found that plaintiff was disabled after April 4, 1985 but not prior to that date (Tr. 19-26). Plaintiff requested a review of this decision on February 15, 1986, arguing that he was disabled prior to April, 1985 (Tr.16). The Appeals Council granted plaintiff's request for review August 18, 1986 (Tr. 13-15), and on October 17, 1986, the Appeals Council entered a decision reversing the ALJ, and applying the grids, found that plaintiff was not disabled (Tr. 4-11). This decision became the final decision of the Secretary. On November 10, 1986, the plaintiff filed the instant suit seeking judicial review of the Secretary's decision.

Analysis and Conclusions

Medical evidence in the administrative

record indicates that in December 1979, plaintiff underwent x-ray examination of his knees which was found to be negative (Tr. 101). Office notes of plaintiff's treating physician indicate that in 1968 and 1975, plaintiff underwent surgeries to his right knee (Tr. 102). In January, 1980, arthroscopic examination of the right knee showed a probable tearing of a ligament (Id.). Range of motion in the right knee was decreased five degrees and some crepitation was found (Tr. 103). Plaintiff's physician felt that the tenderness plaintiff was experiencing was more likely related to early degenerative changes in the knee (Id.).

In March, 1980, plaintiff underwent arthroscopic knee surgery at Midland Hospital under the care of Dr. Ivan (Tr. 105). The Doctor diagnosed internal derangement of the right knee (Id.). In office notes subsequent

to the May, 1980 surgery, Dr. Ivan noted that plaintiff had considerable scarring internally in the right knee (Tr. 115). Plaintiff was placed on an exercise program (Tr. 116). Within approximately two months of the surgery, plaintiff reported that he felt quite a bit better. His range of motion had increased and swelling of the knee had resolved (Tr. 117). Dr. Ivan considered that plaintiff might be able to return to work within approximately three weeks (Id.).

In August, 1980, plaintiff reported intermittent pain and swelling in the knee, and Dr. Ivan found some obvious atrophy in the right quadricep muscle. The Doctor felt that plaintiff "could go back to sedentary or light work. He cannot go back to being an iron worker." (Tr. 118). Plaintiff was urged to continue on an exercise program using weights. Throughout the latter months of 1980,

plaintiff's condition remained essentially stabalized, and he was urged to continue on a weight program (Tr. 119). By March, 1981, Dr. Ivan felt that plaintiff was also suffering from degenerative arthritis and that plaintiff had not done as well as he had hoped (Tr. 120). Dr. Ivan felt that within three months, plaintiff should be able to lift 50 pounds and 100 pounds infrequently, and that he should be able to do some minimal climbing (Tr. 120).

In March, 1981, plaintiff was seen for a second opinion by Dr. Thomas Rush at the request of Dr. Ivan (Tr. 121-123). The Doctor felt that plaintiff had a painful right knee secondary to arthritis (Tr. 122). According to Dr. Rush, "I would say that his degree of disability seems to be out of proportion to his objective findings. I certainly cannot explain why he would develop gradual flexion deforming if he has been performing his exercises

faithfully. I should add that he has a considerable amount of quadriceps atrophy on this side indicating that there has been a fair amount of disuse." (Tr. 122). Dr. Rush felt that plaintif would likely never be able to return to his previous work as an ironworker (Id.). Dr. Rush did not feel that further surgery was justified (Tr. 122-123).

In May, 1981, Dr. Ivan prescribed a vigorous physical therapy program. The Doctor felt that plaintiff could return to "fairly light work" (Tr. 123). The Doctor was somewhat perplexed by plaintiff's failure to improve (Id.).

In February, 1982, plaintiff was seen by physicians at Henry Ford Hospital (Tr. 109-110). At that time, plaintiff was found to have full range of motion and no grating or crepitous in the right knee. Straight leg raising tests were posiitive at 85 degrees for each leg, but the back had full range of motion

without spasm or tenderness (Tr. 110). X-rays taken at that time showed suggestions of calcifications in the medial portion of the right knee (Tr. 111). The study was otherwise found to be unremarkable.

By October, 1984, Dr. Ivan felt that retraining "would be beneficial, but the work would have to be of only moderate heavy work" (Tr. 126).

On November 30, 1984, plaintiff was examined at the request of the Disability Determination Service by Dr. Ponze, M.D. The Doctor found that the circumference of plaintiff's legs and their lengths were equal (Tr. 127). Plaintiff could bend forward 60 degrees, extend his back laterally 15 degrees, and rotate to 15 degrees of the normal 30 degrees. Range of motion in the hands was normal, although osteoarthritic changes were found in the index fingers. No pain, inflammation, or increase in size were

found in any of the joints of the hand (Tr. 127). Plaintiff had normal gait and could walk on heels but had difficulty walking on his toes (Id.). Plaintiff had difficulty squatting, but could get off the examination table without difficulty (Tr. 128). The Doctor found full range of motion in the right knee, however, he reported "some cracking with movement" (Tr. 128). Tenderness was found at the lubosacral joint, along with mild muscle spasm on both sides. Plaintiff did not complain of back pain (Tr. 128). The Doctor noted the three previous surgeries to the right knee and diagnosed osteoarthritis (Id.). X-rays showed mild bony changes t hroughout the lumbar spine with no other abnormalities (Tr. 129). The Doctor stated that plaintiff should not undertake continuous bending, heavy lifting, squatting or kneeling, and that he should watch his blood pressure and lose weight (Tr.

129). The Doctor felt that exercises for his back and some physical therapy were in order (Id).

In April, 1985, plaintiff was admitted to Gladwin Area Hospital under the care of Dr. Rusak, complaining of back pain (Tr. 136). He was discharged two days later after "a good response" to medications and intermittent pelvic traction. According to Dr. Rusak, plaintiff "apparently did not have any rupture of the disc" (Id.). X-rays taken during this hospitalization revealed one lumbosacral segment that was not symmetrical and mild degenerative arthritic spurring in the lumbar spine similar to x-rays taken approximately two years earlier (Tr. 140). Vertebral body height, alignment and interspacing were unremarkable (Id).

In June, 1985, Dr. Rusak reported to the Disability Determination Service (Ex. 20). The

Doctor stated that he had diagnosed degenerative disc disease in the lumbar spine. Range of motion was found to be 80% of normal (Tr. 141). The Doctor had found no sensory or motor abnormalities but did find diminished right knee jerk reflex (Tr. 141). Straight leg raising tests were negative (Id.). After his hospitalization, plaintiff returned to a normal gait without the use of a cane or other aid (Tr. 142). No evidence of muscle spasm was found, and the Doctor stated that at plaintiff's last appointment, shortly after the May, 1985, hospitalization, plaintiff's back pain was diminished (Id.).

In August 1985, plaintiff was seen by Dr. William Redmon, M.D. The Doctor found that plaintiff had limitation in forward motion of the back, side to side leaning, and flattening of the lumbar spinal curve (Tr. 170). Straight leg raising tests produced pain at 50

degrees to each leg. Neurologic examination showed no real impairment (Id.). X-rays showed good maintenance of disc spaces, although one vertebrae was found to be in a "transitional" state as had been noted in previous examinations (Id.). Dr. Redmon felt that plaintiff had "an unstable low back with a chronic pain situation." Dr. Redmon ordered a CAT scan (Tr. 171).

In September, 1985, Dr. Redmon reported that plaintiff felt "much more comfortable" since the prescription of a back brace. Dr. Redmon adjusted the back support (Id.). Plaintiff underwent a CT scan of his lower back in October, 1985 (Tr. 182). That scan revealed evidence of disc bulging at the L3-L4 and L4-L5 levels. According to the reviewing physician, "there was no evidence of focal disc herniation. The L5-L1 interspace is normal." (Id.). Vertebral body abnormalities and spinal

stenosis were not identified (Id.).

In a letter to plaintiff's counsel dated October 30, 1985, Dr. Redmon felt that plaintiff should avoid repetitive lifting, bending, or twisting. He could not specify how long plaintiff could sit at any one time (Tr. 181). According to the Doctor, "eventually he would need to be able to sit, or stand at need" (Id.). Although the Doctor felt that weight limitations were unrealistic, he felt that occasional lifting of 30 pounds is "often less likely to cause trouble than very frequent lifting of a one, or two pound weight" (Id.).

At the hearing, a vocational expert (VE) testified. He described plaintiff's prior work as skilled and very heavy in exertion (Tr. 65). In response to a hypothetical question based upon Dr. Ivan's findings in late 1980 and early 1981, the VE stated that plaintiff would be capable of returning to sedentary work (Tr.

67). Based upon the Doctor's comments in October, 1984, the VE stated that plaintiff could return to medium work (Tr. 67). In response to a hypothetical based upon the findings of Dr. Ponze, the VE stated that plaintiff could return to sedentary and light employment (Id.).

The issue before this Court is whether there was substantial evidence in the record to support the Secretary's determination. Gibson v Secretary of Health, Education and Welfare, 678 F.2d 653, 654 (6th Cir. 1982); Beavers v Secretary of Health, Education and Welfare, 577 F.2d 383, 386-388 (6th Cir. 1978). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v Perales, 402 U.S. 389, 401 (1971), (quoting Consolidated Edison Company v NLRB, 305 U.S. 197, 229 (1938)). In this Circuit:

> The substantial-evidence standard allows considerable latitude to administrative decision makers. It presupposes that there is a zone of choice within which the decisionmakers can go either way, without interference by the courts. An administrative decision is not subject to reversal merely because substantial evidence would have supported an opposite decision (Citations omitted). Baker v Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984), quoted in Mullen v Bowen, 800 F.2d 535, 545, (6th Cir. 1986).

Upon appellate review, the Court may neither try the case de novo, nor resolve conflicts in evidence, nor decide questions of credibility. Myers v Richardson, 471 F.2d 1265, 1967 (6th Cir. 1972), (quoting Floyd v Finch, 441 F.2d 73, 75 (6th Cir. 1971). Even if this court might arrive at a different factual conclusion, the decision must be affirmed if it is supported by substantial evidence. Lane v Gardner, 374 F.2d 612, 616 (6th Cir. 1967). A reviewing court is to look at the evidence "taken as a whole." Allen, 613 F.2d at 145.

In cases such as this, where the Appeals

Council disagrees with the Administrative Law Judge's determination, the issue for review is whether the Appeals Council's findings, not those of the Administrative Law Judge, are supported by substantial evidence. Mullen v Bowen, 800 F.2d 535 (6th Cir. 1986), Oliver v HHS, 804 F.2d 964 (6th Cir. 1986).

On this record, I suggest that substantial evidence supports the Appeals Council's findings. The ALJ found plaintiff disabled from and after April 4, 1985. This corresponds with the date plaintiff was admitted to Gladwin Area Hospital complaining of back pain (Ex. 19, TS. 135). However, while plaintiff complained of back pain, the pain did not radiate and no ruptured intervertebral discs were found (Tr. 136). This corresponds with the later findings of the CT scan taken at Dr. Redmon's request (Tr. 182). Under these circumstances, and in light of the findings of plaintiff's treating

physicians, the Secretary's consulting physician and the opinions of the VE, I suggest that the Appeals Council's actions were within the "zone of choice" properly left to administrative authorities.

Plaintiff, in his brief, appears to argue that the Appeals Council exceeded its proper scope of authority in reversing the ALJ since plaintiff had requested only reconsideration of the date of disability found by the ALJ. In addition, plaintiff appears to advance an argument that the Appeals Council's action was untimely, stating, "Thus the Appeals Council did not Appeal the Decision until more than 60 days time had elapsed and did not give any good reason for their delay." (plaintiff's brief at 3-4). This argument misapprehends both the Appeals Council's authority and plaintiff's own actions in this case. Plaintiff timely filed a request for review with the Appeals Council

(Tr. 16). This request was specifically granted by the Appeals Council (Tr. 13-15). The Secretary's regulations set forth the scope of the Appeals Council's appellate authority in the following terms:

> After it has reviewed all the evidence in the hearing record and any additional evidence received, the Appeals Council will make a decision or remand the case to an administrative law judge. The Appeals Council may affirm, modify or reverse the hearing decision or it may adopt, modify or reject a recommended decision. A copy of the Appeals Council's decision will be mailed to the parties at their last known address. (emphasis added)

20 C.F.R. Sec. 404.979 (1986).

I thus suggest that the Appeals Council did not act beyond the scope of its proper authority in its consideration of plaintiff's request for review.

Recommendations

Therefore, in light of the entire record in this case, it is the opinion of the undersigned that there appears to be substantial evidence

to support the Appeals Council's determination that plaintiff is not disabled as defined in the Social Security Act. Accordingly, IT IS RECOMMENDED THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BE DENIED, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE GRANTED, and that the FINDINGS OF THE APPEALS COUNCIL BE AFFIRMED.

Review

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Sec. 636(b)(1)(C). Failure to file objections constitutes a waiver of any further right of appeal. United States v Walters, 638 F.2d 947 (6th Cir. 1981), states that "a party shall file objections with the District Court or else waive right to appeal."

S/ CHARLES E. BINDER
United States Magistrate

Dated: May 26, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN NORMAN GRONDA,
SS. No. 369-34-5888

Plaintiff

vs No. 86-CV-10397-BC

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.
_____/

JUDGMENT

In accordance with the Order Accepting Magistrate's Report and Recommendation entered this date,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, GRANTED in favor of the defendant.

IT IS ORDERED that the determination of the Secretary of Health and Human services is AFFIRMED.

Dated at Bay City, Michigan, this 8th day of July, 1987.

S/James P. Churchill
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN NORMAN GRONDA,
SS. 369-34-5888

Plaintiff,

vs. No. 86-CV-10397-BC

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Defendant.
_____/

ORDER ACCEPTING THE FINDINGS
AND RECOMMENDATIONS OF THE MAGISTRATE
AND DIRECTING ENTRY OF JUDGMENT FOR DEFENDANT

At a session of said Court held in
the U.S. Courthouse, Bay City, MI,
on the 8th day of July, 1987

PRESENT: HONORABLE JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

This matter was referred to United States Magistrate Charles E. Binder pursuant to the provisions of 28 USC 636(b)(1)(B). The Magistrate's Report and Recommendation was filed on May 26, 1986.

The Magistrate made the following recommendation:

Therefore, in light of the entire record in this case, it is the opinion of the undersigned that there appears to be substantial evidence to support the Appeals Council's determination that plaintiff is not disabled as defined in the Social Security Act. Accordingly, IT IS RECOMMENDED THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BE DENIED, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE GRANTED, and that the FINDINGS OF THE APPEALS COUNCIL BE AFFIRMED.

The plaintiff filed objection to the Report and Recommendation of the Magistrate. Upon de novo review, pursuant to 28:USC:636(b)(1), IT IS HEREBY ORDERED That judgment for the defendant be entered.

S/James P. Churchill
United States District Judge

(2)

No. 88-924

Supreme Court, U.S.
FILED
FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN N. GRONDA, PETITIONER

v.

DON NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether, in a social security disability-benefits case, the Social Security Administration's Appeals Council may, consistent with 20 C.F.R. 404.969, review the entire decision by an administrative law judge (ALJ), and not merely those aspects appealed by the claimant, if the Appeals Council does not give notice to that effect within 60 days of the ALJ decision.

2. Whether substantial evidence supported the Appeals Council's decision that petitioner did not qualify for disability benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-924

JOHN N. GRONDA, PETITIONER

v.

DON NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 856 F.2d 36. The order of the district court (Pet. App. B21-B22) and the Magistrate's Report and Recommendation (Pet. App. B1-B19) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on September 2, 1988. The petition for a writ of certiorari was filed on November 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 23, 1984, petitioner filed a claim for disability benefits under Title II of the Social Security Act,

42 U.S.C. 401 *et seq.* He alleged that pain in his right knee had become so severe that he had become unable to work beginning in 1980. Pet. App. B2. The Michigan Disability Determination Service arranged for petitioner to be examined by a physician, whose findings later led a vocational expert to conclude that petitioner could return to sedentary work. *Id.* at B14. The same conclusion was reached by a doctor who examined petitioner at the onset of the knee difficulties that led to his filing for benefits. *Id.* at B5. Based on that and other evidence, the state agency determined that petitioner's condition did not render him unable "to engage in any substantial gainful activity" under 42 U.S.C. 423(d)(1)(A). Tr. 77-78, 83-84.[1] Petitioner's claim for disability benefits was accordingly denied both initially and upon reconsideration. See Pet. App. A1-A2.

Petitioner appealed the state agency's determination to the Social Security Administration. On January 23, 1986, after a hearing, the administrative law judge (ALJ) found that petitioner did not become disabled in 1980. The ALJ found, however, that petitioner's difficulties with his back had rendered him disabled beginning April 4, 1985, and that petitioner was therefore entitled to benefits from that date. See Pet. App. A2, B3. Petitioner was notified that he had the right to ask the Appeals Council to review the decision. Tr. 18.

On March 21, 1986, within 60 days of receiving the notice (see 20 C.F.R. 404.968(a)(1)), petitioner requested review of the ALJ decision by the Appeals Council pursuant to 20 C.F.R. 404.967. Tr. 16. Petitioner explained his disagreement with the ALJ decision: "The Judge determined I was not disabled until April, 1985. I was disabled

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[1] "Tr." refers to the administrative record.

prior to that date. Substantial evidence does not support the Judges [*sic*] determination. He did not follow the law. I am not appealing the decision that I am disabled after April, 1985." See Pet. App. A2. On August 18, 1986, the Appeals Council wrote to petitioner that his case had been reviewed pursuant to his request and that the Council had found no substantial evidence to support the ALJ's finding that petitioner was disabled at all. *Ibid.*; Tr. 13-15. The Council informed petitioner that he had 20 days within which he could submit any additional evidence or a further written statement as to the facts or the law. Tr. 14. Petitioner did not avail himself of the opportunity. Pet. App. A2. On October 17, 1986, the Appeals Council issued a decision reversing the ALJ's finding of disability, concluding that the evidence established that petitioner had not lost the ability to perform all substantial gainful activity for the required 12-month period because he could perform work of a light level of exertion. Tr. 9-10. That decision became the final decision of the Secretary. Pet. App. A2.

2. Petitioner brought suit under 42 U.S.C. 405(g) seeking review of the Secretary's decision. Petitioner contended that the Appeals Council was not authorized to review the ALJ's finding that he was disabled after April 4, 1985, because petitioner had not challenged that finding and the Appeals Council had not notified petitioner within 60 days of the ALJ's decision that it intended to review the entire case, as he argued the Council was required to do by 20 C.F.R. 404.969. Pet. App. B17.[2] Petitioner also con-

[2] Section 404.969, which is titled "Appeals Council initiates review," states: "Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address."

tended that no substantial evidence supported the Appeals Council's decision. *Id.* at B14.

The magistrate to whom the district court referred the case reviewed the medical evidence and concluded that substantial evidence supported the Appeals Council's decision that petitioner was not disabled within the meaning of the statute. Pet. App. B1-B17. The magistrate found support in the findings of petitioner's treating physicians, the findings of the Secretary's consulting physician, and the opinions of the vocational expert. Accordingly, the magistrate concluded that the Appeals Council's determination was within the "zone of choice" that is properly left to administrative authorities. *Id.* at B16-B17.

The magistrate also determined that the Appeals Council had acted within its authority in considering issues that were not specifically raised in petitioner's request for review. The magistrate relied on 20 C.F.R. 404.979, which governs the scope of Appeals Council review, and which states in pertinent part: "After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, * * * the Appeals Council will make a decision or remand the case to an administrative law judge. The Appeals Council may affirm, modify or reverse the hearing decision or it may adopt, modify or reject a recommended decision." Based on that regulation, the magistrate concluded that petitioner's decision to seek Appeals Council review supplied the Council with authority to review petitioner's entire case without providing petitioner additional notice of the issues to be considered. Pet. App. B18. The district court adopted the recommended decision of the magistrate on July 8, 1987, without additional elaboration. *Id.* at B20-B22.

3. The court of appeals affirmed. Pet. App. A1-A7. The court first rejected petitioner's argument that 20

C.F.R. 404.969 precluded Appeals Council review of the ALJ's finding of disability beginning April 4, 1985, because, petitioner said, he did not challenge that finding and the Council did not give notice that it would review the finding within 60 days of the ALJ decision. Noting the general rule "that agency interpretations of self-prescribed regulations are afforded a considerable presumption of validity" (Pet. App. A3), the court upheld the Secretary's view that Section 404.969 applies only when the Appeals Council, but not the claimant, has initiated Appeals Council review. The court explained that "the task of the Appeals Council is to ensure consistency of results in the benefits program" and that "there is no fundamental unfairness in the Appeals Council's practice." Pet. App. A5. Not only was petitioner "given the opportunity to submit new evidence and/or arguments," the court reasoned, but "[b]ecause the Council unquestionably has the power to review a decision on its own initiative, there is no unfairness implicit in" the Council's reviewing the entire decision on a more limited request for review. *Ibid.*

The court of appeals also held that substantial evidence supported the Secretary's decision that petitioner was not disabled. Pet. App. A5-A6. The court noted that the magistrate had analyzed all the evidence and recommended that the Appeals Council be affirmed. *Id.* at A5. And the court of appeals itself concluded that "[t]he record indicates that [petitioner's] knee and back problems did not prevent him from exerting himself to the extent necessary to perform light work, and that his subjective allegations of pain were disproportionate to his underlying condition." *Ibid.* Accordingly, the court held that petitioner was not entitled to disability benefits.

ARGUMENT

1. Petitioner's primary contention (Pet. 11-15) is that the Appeals Council violated 20 C.F.R. 404.969 by reviewing aspects of the ALJ decision not challenged by petitioner without notifying him of its intent do so within 60 days of the ALJ decision. The court of appeals correctly rejected that contention. Pet. App. A3-A5. Although the Third Circuit has taken a different view, review of the conflict by this Court is not warranted.

a. The Secretary's interpretation of his own regulation is entitled to substantial deference, especially where, as here, it has been consistently maintained. See, *e.g.*, *Mullins Coal Co.* v. *OWCP*, No. 86-327 (Dec. 14, 1987), slip op. 22-24; *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977). Here, the Secretary's interpretation of Section 404.969 is plainly reasonable. Nothing in the language of that regulation suggests that the Appeals Council may not review an entire ALJ decision when a *claimant* seeks limited review pursuant to Section 404.967. Indeed, as the title of Section 404.969 makes clear ("Appeals Council initiates review"), the regulation is addressed only to those cases in which the Council initiates review itself. It has no application where a claimant seeks review under Section 404.967.

This reading of Section 404.969 is entirely consistent with the role the regulations give to the Appeals Council—"to ensure consistency of results in the benefits program" (Pet. App. A5). Nothing in the regulations suggests that Appeals Council review is restricted by a claimant's raising of particular issues, let alone that a 60-day notice is required where the claimant has appealed the ALJ decision. In fact, Section 404.969, which expressly provides for Council-initiated review of ALJ decisions, makes clear that a claimant has no right of control over the finality of an ALJ decision. Moreover, related regulations confirm

that the Appeals Council may review an entire ALJ decision, regardless of what issues a claimant raises. See 20 C.F.R. 404.967 ("If you * * * [are] dissatisfied with the [ALJ's] hearing decision * * *, you may request that the Appeals Council review *that action.*" (emphasis added)), 404.976(a) ("[t]he Appeals Council *may* limit the issues it considers" (emphasis added)), 404.976(b) ("[t]he Appeals Council will consider all the evidence in the administrative law judge hearing record"). In this regulatory context, as the court of appeals explained (Pet. App. A5), petitioner was not somehow unfairly deprived of a vested right in the finality of the ALJ's disability determination.

Nor was there any unfair lack of notice or opportunity to be heard: petitioner had a full opportunity to defend the ALJ's disability finding before the Appeals Council. As the court of appeals held, petitioner has no grounds to object that his benefit application was denied without his having had the opportunity to submit any evidence or arguments he thought important. Pet. App. A5. After reaching an initial conclusion that the ALJ's decision awarding benefits was not supported by substantial evidence, the Council so notified petitioner and offered him the chance to make additional submissions before the Council came to a final decision. *Ibid.* "The essence of due process is the requirement that "a person in jeopardy of a serious loss [be given] notice of the case against him and an opportunity to meet it.' " *Mathews* v. *Eldridge,* 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) (brackets in original)). Petitioner was afforded the required notice and hearing.[3]

[3] In addition, 20 C.F.R. 404.973 provides: "When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered."

b. Petitioner correctly observes (Pet. 11) that the Seventh Circuit is in agreement with the Sixth Circuit with respect to Section 404.969. *DeLong* v. *Heckler,* 771 F.2d 266 (7th Cir. 1985). Petitioner argues that the Eleventh and Third Circuits, in *Kennedy* v. *Bowen,* 814 F.2d 1523 (11th Cir. 1987), and *Powell* v. *Heckler,* 789 F.2d 176 (3d Cir. 1986), have taken contrary positions. Pet. 11. With respect to the Eleventh Circuit, that suggestion is incorrect. As the court of appeals noted (Pet. App. A4), the *Kennedy* court did not rely on Section 404.969. Rather, the court ruled that Section 404.973 required notice of review of unchallenged issues. 814 F.2d at 1527-1528; see note 3, *supra*. Not only is Section 404.973 not at issue in the present case, but petitioner in fact received notice and an opportunity to be heard on the disability question.

The Third Circuit in *Powell* ruled that the Appeals Council could not review an entire ALJ decision when the claimant appealed only part of the decision unless the Council gave notice of its intent to do so within the 60-day period specified in Section 404.969. Although the *Powell* ruling conflicts with the decision of the court of appeals in the present case, that conflict does not warrant this Court's review. As the court of appeals in this case observed (Pet. App. A4), *Powell* rested heavily on the Third Circuit's view that claimants were entitled to receive clear notice that taking an appeal "may jeopardize an entire benefits award." *Powell*, 789 F.2d at 180. Since *Powell* was decided, the Secretary has modified the standard form notice that is sent to claimants when an ALJ decision is reached. The new notice expressly warns claimants that, if they take an appeal, the Appeals Council *will* review the entire case.[4] The Third Circuit may reconsider its *Powell* decision in light of the new notice. In any event, if a con-

[4] The notice states: "When you appeal, you request the Appeals Council to review the decision. If the Appeals Council grants your re-

flict persists, it is most appropriately resolved through the Secretary's own amendment of his regulations. Intervention by this Court is not called for.

2. Petitioner also contends (Pet. 16) that the court of appeals erred in finding, in agreement with the district court and the magistrate, that substantial evidence supports the Appeals Council's conclusion that petitioner was not "disabled" within the meaning of the Social Security Act. This narrow factual contention raises no issue warranting this Court's review. In any event, the decision of the court of appeals is correct. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971). Here, the record contains testimony from a physician and a vocational expert that petitioner could return to sedentary work. Pet. App. B5, B13-B14. Moreover, the doctor who treated petitioner's back problem noted that petitioner had experienced reduced discomfort after being fitted with a back brace. *Id.* at B12. That evidence amply supports the Appeals Council's conclusion that petitioner was not unable "to engage in any substantial gainful activity" (42 U.S.C. 423(d)(1)(A)).[5]

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quest, it will review the entire record in your case. It will review those parts of the decision which you think are wrong. It will also review those parts which you think are correct and may make them unfavorable or less favorable to you. You will receive a new decision."

[5] Petitioner suggests (Pet. 15) that it is the ALJ's, not the Appeals Council's, findings that are to be reviewed to determine whether they are supported by substantial evidence. 42 U.S.C. 405(g) makes clear, however, that courts are to uphold "[t]he findings of *the Secretary* as to any fact, if supported by substantial evidence"; and the Secretary has designated the Appeals Council to be his final arbiter of factual disputes. See 20 C.F.R. 404.900-404.996. Moreover, the overwhelming weight of authority—including, as petitioner concedes (Pet. 15),

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1989

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an *en banc* decision of the Sixth Circuit—supports the conclusion of the court below that findings of the Appeals Council and not findings of the ALJ deserve the full judicial respect afforded to a final decision of the Secretary. *Bauzo* v. *Bowen*, 803 F.2d 917, 920-922 (7th Cir. 1986); *Mullen* v. *Bowen*, 800 F.2d 535 (6th Cir. 1986); *Parker* v. *Bowen*, 788 F.2d 1512 (11th Cir. 1986); *Fierro* v. *Bowen*, 798 F.2d 1351, 1354 (10th Cir. 1986), cert. denied, 480 U.S. 945 (1987); *Berrios* v. *HHS*, 796 F.2d 574, 575 (1st Cir. 1986); *Deters* v. *HEW*, 789 F.2d 1181, 1184 (5th Cir. 1986); *Kellough* v. *Heckler*, 785 F.2d 1147 (4th Cir. 1986); *Razey* v. *Heckler*, 785 F.2d 1426, 1429 (9th Cir.), reh'g denied, 794 F.2d 1348 (1986); *Baker* v. *Heckler*, 730 F.2d 1147, 1149-1150 (8th Cir. 1984).

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